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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

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In re THE HONORABLE
WILLIAM C. McCLAIN,
Judge of the Vigo County Court,

Petitioner.

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Petition for a Writ of Certiorari to the
Supreme Court of Indiana

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# PETITION FOR WRIT OF CERTIORARI

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August 22, 1996

10 pp

## QUESTIONS PRESENTED

In this judicial disciplinary proceeding, the state supreme court appoints three special masters who receive evidence, judge the credibility of witnesses, make findings of fact and where applicable, recommend discipline. The state supreme court reviews the special masters' findings *de novo* under a rule that provides that the state supreme is not bound in any regard by the special masters' findings of fact on credibility. The questions presented are:

1. Whether a state supreme court's rejection of special masters' findings on credibility when those findings are dispositive of the proceedings, and substitution of the justices' own appraisal without seeing, assessing and hearing the witnesses whose credibility is in question, violates due process.
2. Whether a judge who is the subject of disciplinary proceedings can be sanctioned more severely for asserting his constitutional rights to be free from unreasonable bodily intrusion, to present a complete defense, and to be informed of all charges.

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*IN THE*
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In re THE HONORABLE
WILLIAM C. McCLAIN
Judge of the Vigo County Court,

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Petition for a Writ of Certiorari to the
Supreme Court of Indiana

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# PETITION FOR A WRIT OF CERTIORARI

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## OPINIONS BELOW

The opinion of the state supreme court is reported at 662 N.E.2d 935 and is reprinted in the appendix. Pet. App. B, pp. 2a-20a. The findings and conclusions of the special masters have not been reported but are reprinted in the appendix. Pet. App. C, pp. 21a-32a.

## JURISDICTION

The state supreme court rendered its opinion on March 21, 1996. Petitioner timely petitioned for rehearing, which the state supreme court denied on May 28, 1996. Pet. App. A, p. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides in the Due Process Clause, "No State shall . . . deprive any person of life, liberty or property, without due process of law."

The Fourth Amendment to the U.S. Constitution, which is indirectly involved, provides, in part, "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."

The Sixth Amendment to the U.S. Constitution, which is also indirectly implicated, states, in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

## STATEMENT

This is a judicial disciplinary case. Petitioner was the Judge of the Vigo County Court in Indiana. The Indiana Commission on Judicial Qualifications ("Commission") charged petitioner with misconduct. Petitioner denied the charges and challenged the credibility of the Commission's witnesses. Three special masters, each being circuit court trial judges, appointed by the state supreme court heard four days of testimony from 21 separate witnesses before ruling in petitioner's favor expressly finding that the Commission's witnesses lacked credibility and believing petitioner. Upon *de novo* review of the witnesses' credibility, the state supreme court rejected the special masters findings, removed the petitioner from the bench and suspended his license to practice law. The state supreme court never viewed or heard from a single witness.

During the course of the proceedings, the Commission requested that the special masters order the petitioner to submit to a blood test. In opposition, petitioner asserted his Fourth Amendment right to be free from bodily intrusions. The special

masters denied the request for a blood test. The state supreme court ordered the blood test. Later, the state supreme held that petitioner's assertion of a constitutional right to refuse the blood test was "uncooperative conduct" contrary to his "obligations as an attorney and judge . . . ." Pet. App. 12a. In the section of the *per curiam* opinion entitled "Sanction," the state supreme court ruled that petitioner warranted a severe sanction not only because of "his obstructive and uncooperative posture toward the Commission's investigation" regarding the blood test, but also because he advanced a defense credited by the special masters, but not by the state supreme court. Pet. 20a.

## REASONS FOR GRANTING THE WRIT

Petitioner has two arguments for granting a writ of certiorari. First, a state supreme court's rejection of express credibility findings of three special masters who viewed the demeanor and assessed the credibility of witnesses violates due process. The one who decides credibility must see and hear the witnesses. By rejecting the special masters' express credibility findings, the state supreme court has raised "serious questions" under the U.S. Constitution as this Court noted in a prior decision reserving consideration of the question.

Second, the state supreme court violated petitioner's right to due process by sanctioning him for asserting his constitutional rights. Judges do not shed their constitutional rights upon taking the bench. Penalizing judges accused of wrongdoing for exercising their rights is unconstitutional. Punishing a judge for properly raising constitutional issues chills the free exercise of such rights. Petitioner should not be punished for raising his Fourth Amendment rights in response to the Commission's request for a blood test. Petitioner also cannot be punished for presenting a defense. Judges accused of misconduct have a right to present witnesses in their own defense. To find that the petitioner lacked integrity because he advanced a defense penalizes the right to present a defense.

## I. REJECTING EXPRESS FINDINGS ON WITNESSES' CREDIBILITY WITHOUT VIEWING THE WITNESSES VIOLATES DUE PROCESS

After four days of direct observation of 21 separate witnesses, the special masters unanimously entered the following findings on credibility:

### B. FINDING ON MATTER OF CREDIBILITY BY THE MASTERS

1. Brad Kesler has a reputation for vindictiveness and retaliation. At least two witnesses in this matter were apprehensive of what actions Brad Kesler might take due to their testimony.

2. Brad Kesler has a reputation for fabrication, exaggeration and untruthfulness.

3. Brad Kesler's demeanor while testifying before the Special Masters was not convincing as to the truthfulness thereof.

4. The Special Masters find that Brad Kesler is not a credible witness.

5. Laura Hauser initially did not know who sent the letter; later, after confronting Jeff, who denied all allegations contained in the letters, and after talking to Brad, Laura suspected Judge McClain had some involvement in the letter writing. Still later, in conversations with Lori Manley and Lisa McKeand, (as

late as the fall of 1994 and the winter of 1994-95) Laura denied that Judge McClain was responsible for the letters.

6. In a Federal Court Deposition in March of 1993, Laura also denied that Judge McClain had any involvement in the letters.

7. Laura Hauser's demeanor while testifying before the Special Masters was inconsistent.

8. Judge McClain has a reputation in the community for truthfulness and honesty.

9. Judge McClain has never used language contained in the letters in question[] in front of his staff and has a "Victorian Sense of Honor" toward women.

Pet. App. 30a-31a. The state supreme court reviewed these credibility findings *de novo*. Pet. App. 5a (citing *In re Drury*, 602 N.E.2d 1000, 1002 (Ind. 1992)). Under the rules for judicial discipline, the "findings of fact . . . are not binding upon the [state] Supreme Court." Pet. App. 5a (quoting Ind. Admission and Discipline Rule 25 (VIII)(N)(1)). The state supreme court "retains the discretion to . . . reject all or part of the proposed findings of fact . . . ." Ind. Admission and Discipline Rule 25(VIII)(P)(3).

In finding a violation of Canons 1 and 2 of the Indiana Code of Judicial Conduct, the state supreme court rejudged *de novo* the credibility of a number of witnesses in a manner contrary to the express unanimous findings of the special masters. The state supreme court did not attempt to rehabilitate the Commission's "star" witness, Brad Kesler. The state supreme court did reject the special master's express credibility finding regarding Laura Hauser: "her differing opinions as to whether [petitioner] was

responsible . . . are of no particular weight, and are in any event explained satisfactorily . . . ." Pet. App. 10a. While the state supreme court rejected the special masters' express findings on Laura Hauser's credibility by substantially giving more credence to her testimony, it rejected the special masters' express finding on the petitioner's credibility, disbelieving his testimony. Pet. App. 9a ("These findings do not reflect well on [petitioner's] credibility"). To end a judge's career by unilaterally propping up Laura Hauser's inconsistent testimony and tearing down petitioner's credibility, without viewing the witness in a credibility and demeanor vacuum, violates petitioner's constitutional due process rights.

For the past sixty years, this Court has held, "The one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 481 (1936). This principle is supported by the rationale that judicial fact finding on the basis of a written record carries an intolerably high risk of error. While upholding a district court's *de novo* determination to *accept* a magistrate's credibility findings on a motion to suppress, the Court noted a "serious" problem if a district judge were to reverse a magistrate's credibility findings of ultimate fact:

> [In a] situation where a district judge after reviewing the record in the process of making a de novo "determination" has doubts concerning the credibility findings of the magistrate . . . we assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness whose credibility is in question could well give rise to serious questions which we do not reach.

*United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980) (emphasis in original); *see also id.* at 684 (Blackmun, J., concurring) ("I would distinguish between instances where the district court rejects the credibility determination of a magistrate and instances, such as this one, where the court adopts a magistrate's proposed result").

"To be sure," this Court stated, "courts must always be sensitive to the problems of making credibility determination on the cold record." *Id.* at 679. The Court quoted at length from a 19th-century English case which held that a retrial should not be conducted by reading the notes of the witnesses' prior testimony:

> The most careful note must often fail to convey the evidence fully in some of its important elements. . . . It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; . . . the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it.

*Id.* at 679 (quoting *Queen v. Bertrand*, 16 Eng. Rep. 391, 399 (1867)). The Court noted, "This admonition was made with reference to an appellate court's review of a nisi prius judge in a trial on the merits; here we are dealing with a situation more comparable to a special master's findings . . . ." *Id.* at 679-680. There are "serious questions" with the state supreme court's reassessment of credibility in this case. *Raddatz*, 447 U.S. at 681 n.7.

## II. TO PUNISH AN ACCUSED JUDGE FOR EXERCISING HIS CONSTITUTIONAL RIGHTS DEPRIVES HIM OF DUE PROCESS

The state supreme court held that petitioner's assertion of his constitutional right to refuse the blood test requested by the Commission was "uncooperative conduct" contrary to his "obligations as an attorney and judge . . . ." Pet. App. 12a. In the section of the *per curiam* opinion entitled "Sanction," the state supreme court ruled that petitioner warranted a severe sanction not only because of "his obstructive and uncooperative posture toward the Commission's investigation" regarding the blood test, but also because he advanced a truthful defense properly credited by the Masters, but not by the state supreme court which also relied upon the "11th and Maple" incident to discipline petitioner. Pet. App. 20a.

Judges and attorneys do not shed their constitutional rights upon elevation to the bench or admission to the bar. *See In re Ruffalo*, 390 U.S. 544, 551 (1968) (attorney disciplinary actions are "adversary proceedings of a quasi-criminal nature"). Asserting constitutional rights cannot be a basis upon which to impose a sanction because such punishment chills the free exercise of constitutional rights. Judges subject to disciplinary proceedings cannot be sanctioned for being "uncooperative" when asserting their constitutional rights.

This Court has held that "penalizing those who choose to exercise" their rights is "patently unconstitutional." *United States v. Jackson*, 390 U.S. 570, 581 (1968); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). The threat inherent in such a punitive policy serves to "chill the exercise of basic constitutional rights." *Jackson*, 390 U.S. at 582.

The principle that individuals accused of misconduct may not be penalized for exercising their constitutional rights has arisen in many different contexts. *E.g.*, *Wainwright v. Greenfield*, 474 U.S. 284 (1986) (due process prohibits a prosecutor from arguing that a defendant's silence is evidence of sanity); *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) (state may not impose penalties because a witness exercises his right not to give incriminating testimony against himself); *Blacklege v. Perry*, 417 U.S. 21 (1974) (prosecutor cannot reindict a convicted misdemeanant on a felony charge after invoking an appellate remedy); *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (imposing a heavier sentence upon a reconvicted defendant who successfully appealed would be a "flagrant violation of the Fourteenth Amendment"); *Jackson*, 390 U.S. at 581 (a death penalty applicable only to those who assert the right to contest their guilt before a jury discourages assertion of the Fifth Amendment right not to plead guilty and deters exercise of the Sixth Amendment right to demand a jury trial); *Griffin v. California*, 380 U.S. 609 (1965) (privilege against self-incrimination precludes a prosecutor from asking a jury to draw an inference of guilt from a defendant's exercise of the constitutional right to remain silent).

The state supreme court sanctioned petitioner for exercising his constitutional rights in two respects. First, petitioner's assertion of his Fourth Amendment right to be free from the bodily intrusion of a blood test was a legitimate, proper constitutional argument correctly upheld by the special masters. Second, petitioner's advancement of the "McQueary Defense," a truthful defense properly accepted by the special masters, is part of his constitutional right to present a complete defense. The Indiana Supreme Court also relied upon uncharged conduct in disciplining petitioner.

### A. The State Supreme Court Cannot Constitutionally Sanction Petitioner For Asserting His Right To Be Free From A Blood Test

The state supreme court stated, "[T]his case was excessively delayed by a dispute concerning the blood test . . . ." Pet. App. 11a. According to the *per curiam* opinion, petitioner was at fault for the delay: "[petitioner's] uncooperative conduct and delay tactics crossed the line between legitimate discovery dispute and the sort of conduct which is not only antithetical to [petitioner's] obligations as an attorney and judge, but calls into question the integrity of the judicial disciplinary process." Pet. App. 12a.

A review of these proceedings shows that petitioner did not delay these proceedings by asserting his constitutional rights under the Fourth Amendment, which was unanimously upheld by the special masters. The Commission filed formal proceedings and a statement of charges against petitioner on November 5, 1993. Petitioner filed a detailed answer denying the charges on November 24, 1993. Upon the Commission's request, the state supreme court suspended petitioner with pay on January 14, 1994. The state supreme court later appointed the three special masters on March 29, 1994, a delay of more than one hundred (100) days.

More than ten months after institution of formal charges and six months after the appointment of the special masters, September 28, 1994, the Commission filed a cursory, defective one-page motion asking the special masters to order petitioner to submit to a blood test. In opposition to the Commission's motion, petitioner asserted his Fourth Amendment right to be free from bodily intrusion citing *Schmerber v. California*, 384 U.S. 757, 767-768 (1965) and *Matter of Abe, A.*, 437 N.E.2d 265, 266 (N.Y. 1982). A December 27, 1994 letter from the state supreme court's then-Administrator notified the parties that the special masters had set a hearing on the Commission's request for a blood test in February, 1995.

On February 7, 1995, the special masters unanimously ruled that the Commission must show "good cause" for the blood test if petitioner's mental or physical condition could be shown to be at issue, and "probable cause" for the blood test absent any issue of petitioner's physical or mental condition. Pet. App. 39a. The Commission's request for a blood test was insufficient and incomplete.

During a March 22, 1995 telephone conference, the Commission requested leave to file an amended request for blood test. Pet. App. 37a ¶ 1. The Commission filed a much more extensive 12-page "Motion to Compel Blood Test" on March 23, 1995. Petitioner opposed the amended motion, asserting the same arguments as before.

The special masters heard oral argument on the Commission's request for a blood test on June 6, 1995. Twenty days later, June 26, 1995, the special masters entered an order entitled "Findings and Recommendations of Master on Amended Motion to Compel Blood Test" which stated, in pertinent part:

> The Masters . . . find that the [Commission] has failed to show good cause that the requested blood test is related to [petitioner's] mental or physical condition as such condition is related to any controversy involving the pending charges.
>
> The Masters further find that [the Commission] has failed to establish probable cause that [petitioner] should submit to a blood test.

Pet. App. 35a. The special masters found that petitioner's assertion of his constitutional right was meritorious. Petitioner's constitutional arguments were not frivolous, groundless, or unreasonable contentions intended to delay the proceedings.

On August 17, 1995, two months after the special masters' ruling, the state supreme court granted the Commission's motion for a blood test on the sole ground that "this matter is at the discovery stage of the proceedings." Pet. App. 33a. The state supreme court did not address the constitutional issues raised by petitioner. The state supreme court ordered petitioner to submit to the blood test within ten days or until August 28, 1995. Petitioner complied, but the state supreme court's *per curiam* opinion expressed dissatisfaction with his cooperation because it was "[o]n the last possible day" of the ten day period. Pet. App. 11a & n.4. Such dissatisfaction is unfair to petitioner who complied within the time frame provided by the Court.

This state supreme court's *per curiam* opinion suggests that petitioner should not have asserted his constitutional rights because they "excessively delayed" the proceedings and their exercise was "obstructive and uncooperative." Pet. App. 11a, 20a. In future cases, judges and attorneys subject to disciplinary proceedings will avoid exercising any constitutional rights for fear that the state supreme court will deem the exercise of such rights as delaying or obstructing the proceedings. When researching the legal issues and preparing their defenses, judges and attorneys have no standards to determine which constitutional arguments will be so meritorious as to survive not only before the special masters but also the state supreme court, and yet not be grounds for severe discipline. This concept of "defend at your peril" is clearly ingrained.

A judge or attorney subject to disciplinary proceedings should not be sanctioned for being "uncooperative" or "obstructive" by raising a non-frivolous constitutional argument. The standard should be frivolousness. Any other standard chills the free exercise of constitutional rights by those accused of misconduct. To penalize those who choose to exercise their constitutional rights is "patently unconstitutional." *Jackson*, 390 U.S. at 581. Decidedly, the state supreme court's decision not only chills the assertion of constitutional rights, it abrogates the most fundamental of those constitutional rights.

### B. Holding That Petitioner Lacked Integrity In Advancing The "McQueary Defense," Punishes Him For Presenting A Defense To The Charges

The state supreme court held that petitioner's "lack of integrity in connection with this matter is demonstrated . . . [by] his advancement of the 'McQuery Defense' . . . ." Pet. App. 20a. The Court found the "McQuery Defense" incredible. Pet. App. 13a-17a. Even though the special masters unanimously credited the "McQuery Defense" after hearing four days of live testimony from 21 witnesses, whose credibility they scrupulously assessed and whose demeanor they observed, the Indiana Supreme Court, in a credibility and demeanor vacuum, found that the advancement of the defense was grounds for a "severe sanction." Pet. App. 20a.

A person facing charges has the due process right to present witnesses in his own defense. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). Long ago, the this Court stated:

> The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to . . . decide where the truth lies. . . . [H]e has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also United States v. Cronic*, 466 U.S. 648, 656 (1984) (prosecutor's case must encounter and "survive the crucible of meaningful adversarial testing"). The right to present witnesses to establish a defense is rooted in both the Due Process Clause of the Fourteenth Amendment and in the Compulsory Process and Confrontation Clauses of the Sixth Amendment. *Crane v.*

*Kentucky*, 476 U.S. 683, 690 (1986). This Court wrote, "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see also Crane*, 476 U.S. at 690 ("the Constitution guarantees . . . 'a meaningful opportunity to present a complete defense.'")(quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

The Indiana Supreme Court has unconstitutionally and impermissibly punished petitioner for exercising his right to defend himself. The *per curiam* opinion states that petitioner's severe sanction is based in part on his advancement of the "McQuery Defense," implicitly suggesting that the defense should never have been raised, even though truthful. Pet. App. 20a. In an apparent contradiction, the *per curiam* opinion further states that petitioner should have offered additional witnesses to corroborate undisputed, uncontradicted testimony. Pet. App. 14a (petitioner "offered no witnesses to corroborate this testimony"). This unconstitutional shifting of the burden of proof and requirement of producing unnecessary evidence is repugnant, if not abhorrent, to the very concept of due process.

Judges subject to discipline in the future have had their right to present a complete defense chilled, if not frozen, by the Indiana Supreme Court's punishment of petitioner for asserting a defense. The Indiana Supreme Court would have petitioner decide on his own not to present Tom McQueary's testimony, even though McQueary was willing to testify under oath that he had committed a crime for which the statute of limitations had run. McQueary alone was responsible for writing the letters and sending the condom, not petitioner. No standard exists for petitioner to decide whether to present the "McQueary Defense."

The truth of the "McQueary Defense" was evident to the special masters who unanimously credited the truthful defense. The "McQueary Defense" was not a frivolous, unreasonable, or groundless assertion of a defense with the purpose of delaying the proceedings. The Indiana Supreme Court should not punish

petitioner for raising a non-frivolous defense which was truthful and unanimously accepted by the special masters who viewed the witnesses and their demeanor during four days of in-person testimony.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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August 22, 1996

# APPENDIX

IN THE

SUPREME COURT OF INDIANA

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| WILLIAM C. McCLAIN | ) | |
| | ) | No. 84S00-9311-JD-1224 |
| JUDGE OF THE VIGO | ) | |
| COUNTY COURT | ) | |

ORDER

William C. McClain, by counsel, has filed a Petition for Rehearing, which the Court DENIES.

The Clerk is directed to send copies of this Order to all counsel of record.

DONE AT INDIANAPOLIS, INDIANA this /s/ 28th day of May, 1996.

/s/ Randall T. Shepard
Randall T. Shepard
Chief Justice of Indiana

All Justices concur.

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IN THE
INDIANA SUPREME COURT

IN THE MATTER OF )
WILLIAM C. McCLAIN, ) Cause No. 84S00-9311-JD-1224
Judge of the Vigo )
County Court )

JUDICIAL DISCIPLINARY ACTION

Per Curiam.

*Background*

At issue in this case is whether William C. McClain, the elected judge of the Vigo County Court, has engaged in conduct for which he may be disciplined as a judge and if so, what sanction is appropriate.

The Indiana Supreme Court has jurisdiction over this proceeding by virtue of its responsibility for the discipline of attorneys and judges. Ind. Const. Art. 7, § 4. Our state

Constitution also creates a judicial qualifications commission ("Commission"). Ind. Const. Art. 7, § 9. The Commission is responsible for the receipt and investigation of all complaints of misconduct lodged against the judges and justices of this state. Ind. Const. Art. 7, § 11; Ind. Admission and Discipline Rule 25(I)(B). The Court has also created rules and procedures to govern the judicial disciplinary process. Admis. Disc. R. 25.

In this case, the Commission's investigation of alleged judicial misconduct led to the filing of formal charges against McClain ("Respondent"). Admis. Disc. R. 25(V)(G). The Commission's statement of charges alleged that Respondent engaged in a pattern of harassment and abuse of office directed toward a female court employee and her family and boyfriend. Respondent was charged with willful misconduct in office,[1] willful misconduct unrelated to the judicial office that brings such office into disrepute,[2] and with violations of Canons 1 and 2 of the Code of Judicial Conduct.[3]

---

[1] Willful misconduct in office is a sanctionable offense. Adm. Disc. R. 25(III)(A)(3).

[2] Adm. Disc. R. 25(III)(A)(4).

[3] Those Canons state, in pertinent part:

> An independent and honorable judiciary is indispensable to justice in our society. A Judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall preserve the integrity and independence of the judiciary. The provisions of this Code are to be construed and applied to further this objective.

Ind. Judicial Canon 1(A).

> A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Jud. Canon 2(A).

Upon recommendation by the Commission, Respondent was suspended from the performance of his judicial duties with pay, pending the disposition of the charges. Admis. Disc. R. 25(V)(E). Respondent denied any misconduct. By rule, the Court then appointed a panel of Masters to take evidence in a hearing and to report thereon to the Court. Admis. Disc. R. 25(VIII)(I). In this case, three distinguished trial judges were appointed as Masters. The Court wishes to express its gratitude for the diligem and thoughtful work of the Masters in this case.

A hearing was held over several days and evidence was taken. The Respondent was represented by counsel throughout the proceedings. After the hearing and following their deliberations, the Masters filed a report to the Court as anticipated by the applicable rules. Adm. Disc. R. 25(VIII)(N). The report contained forty-eight findings of fact ("Findings"), nine findings on matters of credibility ("Credibility Findings"), and four conclusions ("Conclusions"). The Court adopts all the Masters' findings but not all their conclusions.

The harassment of the female court employee and her family charged by the Commission took the form of anonymous phone calls and vulgar unsigned letters, one of which was accompanied by a used condom. The Commission charged that Respondent was responsible for and was involved in the harassment.

The Masters concluded the Commission failed to prove by clear and convincing evidence that Respondent engaged in judicial misconduct. As provided in our rules, the Commission took a different view and filed objections to the Masters' report with its own recommendation. Adm. Disc. R. 25(VIII)(O). The Commission asserts it proved its case, and recommends that Respondent be removed from the bench. The Respondent replied to these objections and to the recommendation of the Commission. Adm. Disc. R. 25(VIII)(P). At that point, this Court began its own review of the case.

We note at the outset that our standard of review of the Masters' report is *de novo*. *In Re Drury*, 602 N.E.2d 1000, 1002 (Ind. 1992). "The recommended findings of fact and conclusions of law are not binding upon the Supreme Court." Admis. Disc. R. 25(VIII)(N)(1); *see also* Admis. Disc. R. 25(VIII)(P)(3). At the hearing before the Masters, the Commission has the burden of proving misconduct by clear and convincing evidence. Admis. Disc. R. 25(VIII)(L)(1). We have held that in our *de novo* review, the same standard of proof applies. *Drury*, 602 N.E.2d at 1002.

After a thorough review of the record and findings, we conclude clear and convincing evidence demonstrates that Respondent had a participatory role in the sending of the letter which contained the condom and in the pattern of harassment directed toward a court employee and her family. These actions constitute willful misconduct and violate the ethical standards Respondent was obligated to uphold.

*Analysis*

At all times relevant to these proceedings, Respondent was the judge of the Vigo County Court. Finding 2. In August 1990, an individual named Laura Hauser wrote to Respondent inquiring as to possible employment. Finding 3. After meeting with Hauser for lunch, Respondent made suggestions about how to revise her resume. Finding 4. Hauser then submitted her resume to Respondent. Finding 5. Ultimately, Hauser was hired as a secretary for the local community corrections program operated out of the courthouse offices. Findings 9, 10. Hauser worked in the office across the hall from Respondent. Finding 10.

At around the same time Hauser was hired, an individual named Tom McQueary was employed as the assistant director of the community corrections program. Finding 11. During the ensuing months, the director of the program, Respondent, McQueary, and Hauser would go to lunch together from time to time. Findings 11, 12.

Respondent often gave gifts to the courthouse staff. Finding 15. He included Hauser in this gift-giving. On different occasions he gave her a makeup compact, four T-shirts, a beach souvenir, a black garter, a bumper sticker, a coupon book, an inexpensive tennis bracelet, and flowers. Finding 16. On two separate occasions, Respondent also gave Hauser gifts of money. In both instances, the gifts were cash in the amount of one hundred dollars. Finding 21. One of these gifts took the form of a one hundred dollar tip given by Respondent to Hauser while she was working part-time at a second job as a waitress. Transcript, Vol. I, pp. 248-49. There was no evidence of similar large monetary gifts from Respondent to other court staff.

Respondent asked Hauser to have dinner with him in Indianapolis, an invitation which was declined by Hauser. Finding 26. Respondent also commented to Hauser that she would fit in well with his family. Finding 27. Hauser testified at the hearing that she began to feel intimidated by Respondent and the Masters make no finding to the contrary. Transcript, Vol. I, p. 253.

We find that Respondent, in giving Hauser two gifts of one hundred dollars each, asking her to have dinner at a location over fifty miles away, and in telling her she would fit in well with his family, clearly and convincingly exhibited an interest in Hauser that went beyond mere employer-employee relationship.

Throughout the relevant time period, Hauser was living in Terre Haute and dating a man named Jeff Reeder, who is now her husband. Transcript, Vol. I, p. 267; Finding 24. On one occasion during this general time period in which the gift-giving and dinner invitation were going on, Hauser observed Respondent in his truck near her apartment. Finding 23. Specifically, the Masters found Respondent was observed "in his truck at 11th and Maple in Terre Haute, near her apartment." Finding 23. According to Hauser, she and Reeder followed McClain for some time. Transcript, Vol. I, pp. 268, 269. This story is corroborated by the sworn statements of Reeder. Reeder dep., pp. 65-67.

The Honorable Michael H. Eldred, judge of the Vigo Superior Court, gave testimony we find relevant to this incident. According to Judge Eldred, the Respondent stopped into Judge Eldred's chambers during this time period and stated that something odd had happened to him. According to Judge Eldred, Respondent told him that on the previous weekend, he had received an anonymous phone call stating that there was "some trouble" in the general area of Maple and 11th, that he drove to the area, that he saw Laura Hauser coming out of her house with her boyfriend, and that he then left and filed a police report. Transcript, Vol. II, pp. 60-62.

The Honorable Dexter Bolin, Jr., judge of the Vigo Circuit Court, also testified at the hearing. He too expressly recalled talking to the Respondent about the incident. According to Judge Bolin, Respondent came into his chambers and related that he had received an anonymous phone call advising him of trouble around 10th and Maple, that he went up there and drove around, that he spotted Laura Hauser and Jeff Reeder coming out of an apartment, and that he then left the area and filled out a police report. Transcript, Vol. III, pp. 8-9.

Respondent testified at the hearing that it was his position the incident at 11th and Maple never occurred. Transcript, Vol. III, p. 270. Respondent denies ever having received an anonymous call triggering him to travel to 11th and Maple. McClain dep., pp. 31-32, 34-35; Transcript, Vol. III, p. 268. Respondent also denies telling anyone about such an anonymous phone call and denies filling out a police report. Transcript, Vol. III, pp. 268-70.

Respondent has suggested that Judges Eldred and Bolin heard of the incident from another individual named Brad Kesler, who was for a brief period of time the director of the corrections center. Transcript, Vol. III, pp. 270-71; Respondent's Brief, pp. 52-53, 58. The suggestion is that perhaps the judges are confused about who told them about the incident.

However, Judge Bolin expressly stated that it was Respondent who came into his chambers and related the tale about an anonymous call and seeing Hauser and Reeder near 11th and Maple. Transcript, Vol. III, pp. 8-9. He affirmed his recollection on cross-examination. Transcript, Vol. III, pp. 29-30. In fact, Judge Bolin stated he remembered the incident because he could not understand why Respondent was telling him these things and that "it seemed bizarre." Transcript, Vol. III, p. 30. Judge Eldred was also quite specific in his recollection that Respondent had related the story of the anonymous call, the seeing of Hauser and her boyfriend, and the filing of a police report. Judge Eldred even remembered the chair in which Respondent was sitting. Transcript, Vol. II, pp. 60-61. Further, on cross-examination, Judge Eldred expressly denied he heard about this incident from Brad Kesler, testifying that, "[T]he way it occurred is exactly as I have just testified, Judge McClain reported this to me." Transcript, Vol. II, pp. 77-78.

We agree with the Masters that Hauser observed Respondent in the vicinity of 11th and Maple, near her apartment, and that she and Reeder followed his vehicle. Finding 23. We also find clear and convincing evidence that in the general time frame in which Respondent was observed outside Hauser's apartment and was followed, Respondent falsely told both Judges Eldred and Bolin that he had received an anonymous phone call alerting him to alleged trouble near Maple and 10th or 11th. We also find clear and convincingevidence that Respondent told both judges that he went to the intersection and there observed Laura Hauser and her boyfriend, and later falsely denied having said or done this.

We find this evidence, taken in its totality, convincingly shows Respondent knew he had been spotted outside Hauser's apartment and followed, that Respondent had reason to try to conceal his presence in that location, and that he therefore concocted the anonymous phone call story in an attempt to explain what he was doing near Hauser's apartment, should some allegation to that effect be made.

Further, the evidence shows clearly and convincingly that not only did Respondent have an interest in Hauser that went beyond mere employer-employee relationship, the nature of that interest was such that Respondent felt he should keep it hidden, to the point he would lie to fellow judges in order to cover-up this interest.

These findings do not reflect well on Respondent's credibility. We note also that Respondent has testified that he did not know who Hauser was dating the time she worked for the corrections center. McClain dep., p. 27. In his answer to the formal charges, respondent asserted he could not identify Reeder. Answer, p. 5. Yet Judge Eldred testified Respondent told him he had seen "Laura Hauser *and her boyfriend*." Transcript, Vol. II, p. 61. Judge Bolin testified Respondent told him he had seen "Laura Hauser *and Jeff Reeder*." Transcript, Vol. III, p. 9. The plain inference is that Respondent knew more about Hauser and who she was dating than he has been willing to admit, even under oath. Further, Respondent testified he never told Hauser she would fit in well with his family. Transcript, Vol. III, p. 210. Yet the Masters expressly found that he *had* made such a statement. Finding 27.

The Masters found Respondent has a reputation in the community for truthfulness and honesty. Credibility Finding 8. However, this does not preclude a finding of specific instances of dishonesty in his testimony, and we find that Respondent was untruthful concerning his conduct and relationship with Hauser.

In this general time frame, Hauser and her father received anonymous phone calls making derogatory comments about Reeder. Findings 28, 19. Hauser testified, and the Masters agreed, that she received a call "suggesting that Jeff Reeder didn't love her and that she should leave him alone." Finding 28. Hauser's father received two anonymous calls, one from a male and one from a female making defamatory statements about Reeder. Finding 29. Significantly, one of the calls suggested that Reeder was "loose with women" and that Mr. Hauser would be "receiving proof in the mail." Finding 29.

Within a month of that phone call to her father, Hauser received an anonymous letter at work. Finding 30. The letter asserted to contain the so-called "proof" that Reeder was being unfaithful to Hauser. Comm. Exh. 2. Enclosed in the letter was a used condom. The writer of the letter suggested, in an exceedingly vulgar way, that Hauser would be able to recognize the condom as belonging to Reeder.

In this same time frame, Hauser's father also intercepted an unsigned letter intended for Hauser's mother which purported to be from a girlfriend of Jeff Reeder. The letter is filled with derogatory comments about Hauser. Finding 30; Comm. Exh. 1. The text of this letter is extremely vile and graphic in its descriptions and comments about Hauser. The author goes to great lengths to make the most painfully cruel and offensive assertions about Hauser. The author could only have intended to hurt Hauser and her family.

Hauser suspected that Respondent was responsible for the hateful communications. Transcript, Vol. I, pp. 275-76. As the Masters noted, many very specific facts about Hauser contained in the communications were known to Respondent. Finding 48. The Masters also noted that others "could have" known some of these things as well. Finding 48. The Masters noted too that Hauser gave conflicting statements about whether Respondent was responsible for the communications. Credibility Finding 5. However, her differing opinions as to whether Respondent was responsible were expressed before certain additional facts became generally known, are of no particular weight, and are in any event explained satisfactorily by Hauser. It is undisputed that the specific facts known to the author of the letter were known by a "very few people." Transcript, Vol. I, p. 276.

From these events, it is obvious that one or more of the few people who knew certain specific facts about Hauser and her family were using clandestine and repulsive methods to try to "break up" the relationship between Hauser and Reeder. The responsible person or persons were doing so in a manner

calculated to be as painful and traumatic to Hauser and her family as possible. The letters use very hateful language in reference to Hauser. Comm. Exh. 1, 2.

Ultimately, in the belief that Respondent was responsible for the vile communications, Hauser asked the Commission to investigate the matter. An investigation ensued, resulting in the filing of formal charges on November 5, 1993. At that time, Respondent denied having any involvement in the contemptible communications to Hauser and her family. Answer, pp. 14-15.

Hauser had saved the condom and gave it to the Commission. At the Commission's request, the State Police performed a laboratory analysis of the condom and was able to reconstruct some DNA strands still present on the condom. When Respondent was finally compelled to submit to a blood test,[4] the lab results confirmed that the semen present in the condom belonged to him. Finding 32.

Because this case was excessively delayed by a dispute concerning the blood test and because we wish to stress the role of cooperation in proceedings of this nature, we take this

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[4] The Commission asserts, and Respondent does not deny, that even before the filing of formal charges in November of 1993, while this matter was still in the confidential investigative stage, it asked Respondent for a blood sample to allow a comparison of the Respondent's DNA to that recovered by the State Police laboratories from the condom. Although a finding that the semen in the condom did not belong to him might have ended the investigation before charges were filed, Respondent refused to submit to a blood test. Later, after charges were filed, the Commission made a formal request for a blood sample under the applicable rules of discovery. The Commission's request was alternatingly agreed to and resisted. Ultimately, protracted litigation of the issue was resolved by an order from this Court dated August 17, 1995. On the last possible day, Respondent complied with this Court's order. We note also that a DNA report prepared by Respondent's expert should have been provided to the Commission but Respondent refused to provide the report until ordered to do so by this Court after the hearing before the Masters had already concluded.

opportunity to examine the obligation of a judge to cooperate in the investigation and prosecution of a judicial disciplinary proceeding.

As we have held in the context of attorney discipline cases, the party being investigated has a duty to cooperate in the process. *In re Allen*, 470 N.E.2d 1312 (Ind. 1984). The failure to cooperate may in itself constitute independent grounds for disciplinary charges in some instances. *Id.* It should not need stating to any judge in this State that the same duty of cooperation exists in judicial disciplinary cases. As the Code of Judicial Conduct makes clear, judges are held to high standards of conduct. Jud. Canon 1. Further, our ethical rules make it clear that all judges and attorneys have a duty to cooperate with the investigative process of a disciplinary agency. Ind. Professional Conduct Rule 8.1. As we noted in *Allen*, the duty to cooperate does not require an admission of misconduct nor does it preclude the advocacy of a theory of defense which is contradictory to the allegations of misconduct. 470 N.E.2d at 1315.

We draw no inference of guilt from Respondent's lack of cooperation with the discovery process. The Court simply takes this opportunity to stress that cooperation with the investigative and discovery processes is expected of any judge under investigation by the Commission and that in the proper case, the failure to cooperate could in itself constitute actionable misconduct. On the other hand, Respondent's uncooperative conduct and delay tactics crossed the line between legitimate discovery dispute and the sort of conduct which is not only antithetical to Respondent's obligations as an attorney and judge, but calls into question the integrity of the judicial disciplinary process.

Fast on the heels of this incriminating blood test evidence and just before this matter was to proceed to a hearing before the Masters, there arose a new "alibi" witness who had kept silent throughout the almost two years this matter had been public knowledge.

Thomas McQueary is a distant relation of Respondent. The two met in the early eighties, prior to when Respondent became a judge, and became good friends. Transcript, Vol. III, p. 51. As an attorney, Respondent represented McQueary in the McQueary's divorce. Transcript, Vol. III, p. 51. McQueary came to work at the corrections center in 1990, initially as the assistant director and later, in March of 1991, as its director. Findings 5, 14.

During the time period McQueary worked at the corrections center, he and Respondent went to lunch almost every day. Transcript, Vol. III, p. 55. The two took a vacation trip together to Florida. Transcript, Vol. III, p. 58. Ultimately, McQueary would resign his position as director following criminal charges of official misconduct to which he pled guilty. Transcript, Vol. III, pp. 101-102. Judge Bolin testified that Respondent "defended his cousin Tom McQueary by publicly excoriating the women in the program who had brought the charges against him." Transcript Vol. III, p. 39. Judge Bolin recalled that at a press conference, Respondent referred to the women as "sluts." Transcript, Vol. III, p. 39.

While serving as the corrections program director, McQueary met Hauser. He claims to have established a personal relationship with her as well as professional, stating: "Like a brother-sister relationship. We was pretty close." Transcript, Vol. III, p. 53.

Against this background we now summarize the testimony given by McQueary at the hearing in this case.

Because of his dislike for Reeder and to "get even" with him for these earlier incidents, McQueary supposedly concocted a plan to "create a problem" in Reeder's relationship with Hauser. Transcript, Vol. III, pp. 64, 75. McQueary testified he was "angry at Reeder [and] wanted to break them up." Transcript, Vol. III, p. 81. According to McQueary, it was he who authored the loathsome letters which were sent to Hauser and her family.

In order to get the letters in a woman's handwriting, he enlisted the aid of a male friend who in turn enlisted the aid of a woman with whom the friend worked. Transcript, Vol. III, p. 65.

McQueary describes the following course of events as to the sending of the condom. He found the condom in a wastebasket in his home and "thought it was his own." Transcript, Vol. III, p. 67. He put the condom in a sandwich bag, drove it to a friend's house, and gave the friend a draft of a letter to write toHauser. Transcript, Vol. III, pp. 90-92. According to McQueary, the friend and the other woman enlisted to help thought it was all a "practical joke." Transcript, Vol. III, p. 88.

The friend who purportedly assisted McQueary is now deceased and unable to corroborate this story. Transcript, Vol. III, p. 78. The name of the woman who allegedly assisted in this vulgar venture unfortunately "escapes" McQueary. Transcript, Vol. III, p. 78.

Of course, the condom contains Respondent's sperm cells, not McQueary's. Finding 32. Having continuously denied any knowledge whatsoever concerning a condom being sent to Hauser, at the hearing Respondent offered the following explanation about how his used condom found its way into McQueary's wastebasket. During a time period in which McQueary was in Tulsa, Oklahoma, Respondent was apparently asked to feed McQueary's dog. Transcript, Vol. III, p. 67. Respondent was given a key to McQueary's home. Transcript, Vol. II, p. 67. Thereafter, according to his own testimony, Respondent had sexual relations with women several times at McQueary's house. Transcript, Vol. III, pp. 214-15. After having sex, Respondent allegedly would deposit his used condoms in McQueary's wastebasket. Transcript, Vol. III, pp. 215-16. Respondent offered no witnesses to corroborate this testimony.

In asserting this "McQueary defense," Respondent asks this Court to believe that in furtherance of a plot to get even with Reeder for some old grudges, McQueary took a used condom out of his wastebasket which he thought to be his own but which

had actually been put there by Respondent, who was using McQueary's house for sexual liaisons while McQueary was on a trip to Tulsa; McQueary then put the condom in a sandwich bag, delivered it to a now deceased friend, who then had an unnamed female write an obscene note purportedly dictated by McQueary, after which the whole disgusting package was put together and sent to McQueary's friend, Hauser, with the dead and unknown co-conspirators thinking it was all a practical joke.

Respondent asks the Court to believe that McQueary kept all this a secret from everyone during the almost two years Respondent was being publicly charged with harassing Hauser and suspended from serving as judge. Apparently, neither of his conveniently unavailable co-conspirators thought to come forward to exonerate the Respondent by pointing the blame at McQueary either. McQueary himself came forward only after the newspapers published an article indicating that Respondent was going to be required to take a blood test. Transcript, Vol. III, p. 74.

We are asked by Respondent to believe that McQueary decided to speak up even though he thought the condom was his and did not belong to Respondent. McQueary asserts he decided to call Respondent and "confess" because he thought the tests would show the condom to have Respondent's DNA on it due to the fact the two of them were distantly related. Transcript, Vol. III, p. 74. (One of Respondent's grandmothers and one of McQueary's grandmothers were sisters. Transcript, Vol. III, p. 51). According to McQueary, he then called the Respondent to tell him that it was he who sent the letters and condom to get even with Reeder, stating to Respondent, "You know how I am, I always like to get even with people." Transcript, Vol. III, p. 75.

Respondent asks us to believe that McQueary engaged in this complex and ludicrous scheme to "get even" with Reeder despite having a close "brother-sister" relationship with Hauser. Yet the letters sent to Hauser and her parents which he claims to

have authored are utterly vile and repulsive in their references to Hauser, and were obviously designed to be offensive and hurtful to Hauser and to members of her family. The graphically sexual and sick-spirited language and overall meanness of the tone of the letters are totally inconsistent with McQueary's claim of closeness and caring for Hauser.

Respondent asks us to believe McQueary's claim to have been motivated to engage in this degrading course of conduct in order to get even with Hauser's boyfriend over a long-standing grudge he bore against him about a stolen guitar and some comments made by Reeder to McQueary's daughter; to believe his co-conspirators in this nightmarish escapade thought this *a practical joke*, and are now either dead or their names forgotten; and to believe McQueary never told his friend, vacation partner, and almost daily lunch companion or the Commission about any of this -- either before or during the prosecution of Respondent.

The "McQueary defense" breaks down completely with Respondent's claim that his own used condom became involved in this case by mere coincidence arising from Respondent's untimely use of McQueary's house for sexual liaisons. We are asked to believe it was just Respondent's bad luck that both he and McQueary were having sex with unidentified persons in McQueary's house and both depositing their used condoms in the same bathroom wastebasket at McQueary's house during the same general time frame, and that it was Respondent's condom, rather than McQueary's, which was inadvertently plucked out for purposes of harassing Hauser and Reeder. Respondent asks us to believe that he had no knowledge or involvement in any of this.

Respondent advances this incredible tale, without corroborative evidence of any kind in the form of testimony from any of McQueary's or Respondent's alleged sexual partners, or from anyone who knew McQueary or his now deceased co-conspirator, or from the alleged female letter-writer herself, whose name "escapes" McQueary.

The Masters made no finding as to the credibility of McQueary, Respondent, or of this story. However, we find this eleventh hour tale of vengeance and coincidence to be unbelievable and the two perpetrators of this story to lack credibility.

The Masters made no finding as to who was actually responsible for the offensive calls, letters, and the condom. They found only that McQueary "admitted that he placed the used condom in the letter to Laura Hauser," and that McQueary "admitted he obtained a used condom from the bathroom wastebasket in his home." Findings 46, 47. These findings of the Masters reciting the content of McQueary's testimony, but not embracing its accuracy, in no way preclude a finding that McQueary's story is untruthful and that it was Respondent who masterminded the offensive activity complained of by the Commission.

After reviewing and adopting the findings of the Masters and making our own findings based upon the evidence of record, we are left with a firm and certain conviction that Respondent intentionally participated in the harassment of a court employee and her family. We find it wholly incredible that his own used condom found its way into Hauser's mailbox without Respondent's knowing participation in the process.

*Conclusions*

The Commission made certain allegations which the Masters concluded had not been proven by clear and convincing evidence. In particular, the Masters concluded the Commission failed to prove by clear and convincing evidence that Respondent had referred to Laura Hauser as his private stock; or that Respondent asked Brad Kesler, at that time the director of the corrections center, to arrange a date with Hauser; or that he asked Kesler to break up the relationship between Hauser and Reeder; or that he asked Kesler to plant drugs or stolen property in Reeder's vehicle. Conclusion 2. We agree with and adopt this conclusion.

The Masters also found the Commission failed to prove by clear and convincing evidence that the hiring of Hauser and the giving of gifts to Hauser violated Canons 1 and 2 of the Code of Judicial Conduct. Conclusion 3. We agree there was insufficient evidence of wrongdoing with regard to Hauser's hiring. With regard to the gift giving, we are loathe to lay down a rule prohibiting the giving of gifts to employees by judges. Nevertheless, it is not hard to imagine circumstances in which personal gift giving, especially fairly large monetary gifts, could be viewed as a form of unwanted attention.

With regard to the conduct of judges toward court staff and all others with whom the judge comes in contact, we find the words of the Ohio Supreme Court helpful and instructive to all the judges of this State:

> Improper conduct which may be overlooked when committed by an ordinary person, or even a lawyer, cannot be overlooked when committed by a judge. By accepting his office, a judge undertakes to conduct himself in both his official and personal behavior in accordance with the highest standard that society can expect.

*Cincinnati Bar Ass'n v. Heitzler*, 291 N.E.2d 477, 482 (Ohio 1972), *cert. denied*, 411 U.S. 967 (1973). This notion is embodied in our Judicial Canons, which state in part, "A judge must avoid all impropriety and appearance of impropriety." Jud. Canon 2(A), *Comments* (amended February 1, 1995).

In this instance, however, we are guided by the Masters' findings that most of the gifts given to Hauser were similar to those given to other court staff members and that he had on occasion helped other staff members with financial difficulties without being asked. Findings 16, 22. We are thus persuaded that official misconduct has not been clearly and convincingly proven with regard to gift giving.

This brings us to the remaining Conclusions 1 and 4, in which the Masters concluded the Commission failed to prove Respondent "wrote or caused to be written" the letters sent to Hauser and her family or "that he made or caused to be made" the harassing phone calls, and that he had not committed any misconduct. However, as noted above, we find clear and convincing evidence that Respondent knowingly participated in the sending of his own used condom and the accompanying letter to Hauser. Respondent's participation in the sending of his condom to Hauser was a follow-up activity to the earlier phone call which had asserted that proof of Reeder's purported infidelities would be forthcoming. The letter accompanying the used condom expressly claimed to be that "proof." Comm. Exh. 2. From this we discern clear and convincing evidence that Respondent also knowingly participated in this particular harassing phone call to Hauser's father.

We therefore conclude that Respondent violated Judicial Canon 1 in that he failed to participate in and preserve the integrity of the judiciary. We further conclude that Respondent violated Judicial Canon 2 in that he failed to act at all times in a manner that promotes public confidence in the integrity of the judiciary. We also conclude Respondent has committed willful misconduct unrelated to the judicial office that brings the office into disrepute. Adm. Disc. R. 25(III)(A)(4).

*Sanction*

There remains the issue of the appropriate sanction to impose. Upon finding of judicial misconduct, the Court may impose removal, retirement, suspension, discipline as an attorney, limitations or conditions on the performance of judicial duties, reprimand or censure, fine, assessment of costs and expenses, or any combination of the above. Admis. Disc. R. 25(IV)(A).

The Commission has recommended that Respondent be removed from the bench and forbidden from *ever* holding any judicial or quasi-judicial office again. Because the Commission

has failed to prove all its charges, we are not convinced such a sanction is appropriate. On the other hand, integrity is the essence of the judicial vocation. Respondent's lack of integrity in connection with this matter is demonstrated not only in the conduct for which he is being sanctioned, but also in his advancement of the "McQueary defense" and in his obstructive and uncooperative posture toward the Commission's investigation. Respondent has brought the judiciary into disrepute, has violated the trust of the people who placed him in office, and has been dishonest with the Commission, the Masters, this Court, and the citizens of Indiana. We therefore conclude Respondent's conduct warrants a severe sanction.

It is therefore ordered that effective immediately, William C. McClain is removed as Judge of the Vigo County Court. The Indiana Constitution requires that a "judge so removed by the Supreme Court is ineligible for judicial office and pending further order of the Court he is suspended from practicing law in this State." Ind. Const. art. 7, § 11. Respondent's suspension from the practice of law in this State will remain in effect for a period of no less than two years from the date of this opinion. At the end of that time period, Respondent may petition for reinstatement as an attorney under the applicable rules. The Respondent is further directed to pay the costs and expenses of this action.

IN THE

SUPREME COURT OF INDIANA

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| N THE MATTER OF | ) | |
| WILLIAM C. McCLAIN | ) | |
| | ) | No. 84S00-9311-JD-1224 |
| JUDGE OF THE VIGO | ) | |
| COUNTY COURT | ) | |

## FINDINGS AND CONCLUSIONS OF SPECIAL MASTERS

Beginning on September 18, 1995, and concluding on September 21, 1995, this matter was submitted to the Special Masters upon the Complaint filed by the Indiana Commission on Judicial Qualifications. The Special Masters, having heard and weighed the evidence, having determined the credibility of the witnesses and having taken the matter under advisement, now enter their findings and recommendations as follows:

### A. ISSUES PRESENTED BY COMPLAINT OF THE COMMISSION AND STATEMENT OF CANONS 1 AND 2

1. That from late 1990 until approximately May, 1991, Judge McClain violated Canons 1 and 2 of the Code of Judicial Conduct and committed willful misconduct in office, willful misconduct unrelated to the judicial office that brings the office into disrepute, and conduct prejudicial to the administration of justice by engaging in a pattern of harassment and abuse of office directed at a female court employee, Laura Hauser, and her boyfriend, Jeff Reeder.

a. That Judge McClain personally hired Laura Hauser as secretary for the Community Corrections Program.

b. That Judge McClain told Brad Kesler, Director of the Community Corrections Program, that Laura Hauser was his "private stock".

c. That Judge McClain asked Brad Kesler to arrange a date between Judge McClain and Laura Hauser.

d. That upon Judge McClain learning that Laura Hauser was dating Jeff Reeder, the Judge inquired of Brad Kesler as to whether Brad Kesler could break them up.

e. That Judge McClain referred Brad Kesler to Jeff Reeder's place of employment and parking area and asked Brad Kesler to plant drugs or stolen property in Reeder's car indicating he (the Judge) would then have an opportunity to sentence Jeff Reeder for a crime and send him away.

f. That Judge McClain began to give Laura Hauser flowers and gifts at work.

g. That on three separate occasions, Judge McClain gave Laura Hauser a coupon book, a makeup compact, an inexpensive gold-toned bracelet and brought from Florida for her three tee shirts, a globe beach scene and a black garter.

h. That Laura Hauser did not respond to or reciprocate Judge McClain's attentions and only reluctantly accepted the gifts.

i. That Laura Hauser's father received an anonymous telephone call from a man saying Jeff Reeder was a bad influence for Laura Hauser and that he was involved with another woman. The caller also made derogatory remarks about Laura Hauser.

j. The day following the anonymous call to Hauser's father, Judge McClain sent flowers to Laura Hauser at work, and, referring to Jeff Reeder, told Laura Hauser to be careful with whom she associated.

k. Within approximately one week following the Judge's conversation referred to in paragraph j., Laura Hauser received an anonymous call from a woman who falsely claimed she was sleeping with Jeff Reeder.

l. Approximately two weeks later, Laura Hauser's mother received a letter purportedly from a woman who stated it was she who called Laura Hauser at work, claimed she was sleeping with Jeff Reeder and suggested that Laura Hauser should leave Jeff Reader alone.

m. That the letter contained derogatory comments about Laura Hauser and contained personal information about Laura Hauser some of which she had previously relayed to Judge McClain.

n. That within a day or two, Laura Hauser received a letter at work in the same handwriting as the previous letter, in which the author stated "Bitch, L., since you won't leave J. Alone and don't believe we are lovers, I've got proof". Enclosed in the envelope with the letter was a used condom.

2. CANNON *[sic]* 1.

An independent and honorable judiciary is indispensable to justice in our society. A Judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards in order to preserve the integrity and independence of the judiciary. The provisions of this Code are to be construed and applied to further that objective.

3. CANNON *[sic]* 2.

A Judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

## B. FINDINGS OF FACT BY THE SPECIAL MASTERS

1. The charges are brought before the Indiana Supreme Court, which pursuant to Article 7, Section 4 of the Indiana Constitution of Indiana and pursuant to Admission and Discipline Rule 25, has original jurisdiction over the discipline, suspension, and removal of all judges of the State of Indiana.

2. At all times mentioned herein, the Honorable William C. McClain was the duly elected judge of Vigo County Court.

3. On August 6th, 1990, Laura Hauser wrote to Judge McClain inquiring as to possible employment.

4. Subsequent to August 6th, 1990, Judge McClain met with Laura Hauser for lunch and suggested she revise her resume and send it to him.

5. On August 20th, 1990, Laura Hauser mailed to Judge McClain her revised resume.

6. Prior to October 11th, 1990, Brad Kesler, a probation officer in Vigo County Probation Department, in conjunction with Vigo Circuit Court Judge Dexter Bolin, wrote a grant application to create a Community Corrections Program for Vigo County. The original proposal was rejected.

7. Prior to October 11th, 1990, the Vigo County Community Corrections Advisory Board was established; a second grant application was submitted to the Indiana Department of Corrections and was accepted.

8. During the formation of the Community Corrections Program, an advertisement for a director was published and several persons submitted applications, including Brad Kesler. On October 11th, 1990, all applicants except Brad Kesler had withdrawn their names from consideration.

9. On October 11th, 1990, the Advisory Board met and the minutes of the meeting read as follows:

> "Discussion of the appointment of Director. Judge McClain and Judge Eldred reports on applications received and pre-screened. Mr. Blade moves to hire Brad Kesler. Seconded by Sheriff Jenkins. Voice vote held. Motion is passed with no opposition. Brad Kesler appointed Director effective November 15th, 1990. Mr. Kelley moves to authorize Director to hire a secretary as soon as possible. Seconded by Judge McClain. Voice vote had. Passed without opposition."

10. Laura Hauser was never interviewed by Brad Kesler for the position of Secretary. Judge McClain informed Laura Hauser that she would be employed as secretary, and she commenced working as secretary on October 15th, 1990, first in the offices of Judge McClain. After approximately one week she moved to an office across the hall from Judge McClain's offices.

11. Shortly after October 11th, 1990, Tom McQueary, a third cousin to Judge McClain, was hired as Assistant Director of the Community Corrections program. It is not clear who hired Tom McQueary as Brad Kesler states that he was told who to hire as secretary and Assistant and Tom McQueary states he was called by Brad Kesler and asked if he wanted the job.

12. During the months of October, November and December of 1990, Brad Kesler, Laura Hauser, Tom McQueary and Judge McClain would meet for lunch and at other times during this period Laura Hauser would not accompany the others for lunch.

13. In December of 1990, the relationship between Brad Kesler and Judge McClain began to deteriorate as it was revealed that Brad Kesler was altering time records of criminals

assigned to Community Corrections by giving them extensions of time or double credit, contrary to policy. Brad Kesler also failed to collect user's fees as authorized by the Advisory Board. He further failed to take appropriate steps to comply with the bidding process for the purchase of a Community Corrections Van and grant money was almost lost.

14. On March 1st, 1991, Brad Kesler resigned as Director of the Community Corrections and returned to the Vigo County Probation Department as a probation officer; Tom McQueary was subsequently appointed as Interim Director.

15. Judge McClain often gave gifts to staff members, including Court staff, Community Corrections staff and Clerks assigned to his Court. He brought back items from vacations and trips and gave gifts on birthdays, Secretary's Day and Christmas.

16. Judge McClain gave Laura Hauser a makeup compact, three tee shirts, a beach souvenir, another tee shirt, a black garter, a bumper sticker, a coupon book, a tennis bracelet and flowers. Most of these gifts had values of Ten Dollars ($10.00) or less, and were of the same kind, frequency and value as those given to other staff members.

17. Although Laura Hauser stated that she had made one attempt to return gifts from Judge McClain, no evidence was offered that Judge McClain knew of this attempt; Laura Hauser retrieved the gifts from the Judge's office.

18. Laura Hauser never told Judge McClain that she didn't want to receive any gifts, but she thanked him personally and also sent a thank you note on one occasion which stated:

> "Judge - Thanks for 'the day and @ the beach,'
> I will think of Tom & you when I look @ it, oh
> yea and the bunnies: Laura"

19. Prior to receiving a planter from Judge McClain, Laura Hauser asked him to whom he was giving the planter and he told her she could have it; she went to his truck and obtained the planter.

20. Laura Hauser placed the bumper sticker on her car.

21. Laura Hauser had made it generally known in the work place that she was having financial troubles. On two separate occasions Judge McClain gave Laura One Hundred Dollars ($100.00). The first occasion occurred at Ambrosini's Restaurant and followed her comment that she bounced a check to her dentist. Prior to the second occasion, Laura had remarked that she didn't have enough money to pay for her insurance.

22. Judge McClain had helped other staff members financially who were having financial difficulties, often without being asked.

23. On one occasion Laura Hauser observed Judge McClain in his truck at 11th and Maple in Terre Haute, near her apartment. Laura and Jeff Reeder followed Judge McClain's vehicle.[1]

24. Laura Hauser had been dating Jeff Reeder since 1989. They had a good relationship except for a period during the spring of 1990 when Jeff was seeing another woman. After confrontation, Laura and Jeff reconciled and were recently married.

25. Judge McClain told Laura Hauser to be careful with whom she associated. This remark concerned an incident in which a probationer came into the Community Corrections Office and made personal remarks.

26. Judge McClain asked Laura Hauser to have dinner with him in Indianapolis, which she declined.

27. Judge McClain once commented to Laura Hauser that she would fit in well with his family.

---

[1] The issue of a chase was not charged in the Commission's Complaint against Judge McClain; nor do the facts surrounding Laura's observation constitute a violation of Canons 1 and 2 of the Indiana Judicial Code of Ethics.

28. In March of 1991, Laura Hauser received an anonymous telephone call while working at Community Corrections; the caller suggested that Jeff Reeder didn't love her and that she should leave him alone.

29. In March of 1991, James Hauser, Laura's father, received two anonymous telephone calls, one from a male and one from a female suggesting that Jeff Reeder was of questionable character, had drug problems and that he was "loose with women" and that he would be receiving proof in the mail.

30. In April of 1991, Laura Hauser received an anonymous letter, containing a used condom, through the mail at work. Her father also received an anonymous letter at his home. The letters contained crude, vulgar language, vile sexual reference and threats that Laura should leave the writer and Jeff alone.

31. The letters received by Laura Hauser and her father spell the last name of Laura as "Houser".

32. The used condom accompanying the anonymous letter received by Laura Hauser at her place of work contained sperm cells belonging to Judge McClain.

33. On October 4, 1991, Judge McClain, Laura Hauser and two other persons had dinner in a restaurant. At that time, Laura Hauser made efforts to feed chicken livers to Judge McClain with her hands. This action was in no way solicited by Judge McClain.

34. In October of 1991, Laura Hauser left a "joke" on Judge McClain's chair in his office, where emergency court business was normally left while he was on the bench. This "joke" was in the form of a copy of a One Hundred Dollar bill with a drawing made by Mrs. Hauser and the words "Guess Who's" which made reference to lewd remarks by a Community Corrections client who worked as a topless dancer.

35. In October of 1991, Judge McClain asked Laura Hauser to preview a song which he had written. Other staff members were also asked to preview the same song and witness the date on which they previewed the song.

36. Laura Hauser inquired of at least three individuals facts about Judge McClain's personal life, including the type of property he owned.

37. In late 1991, the five judges of the Vigo County Courts became aware that Brad Kesler was considering a run for the office of Vigo County Recorder in 1992. The Judges met and decided unanimously that a conflict of interest might result if Brad ran for office while employed as a Probation Officer. The five judges sent Brad a letter requesting that Brad notify them in writing of his intention to run for such office by December 31, 1991, and that if he intended to run for such office, he should resign from the Probation Department by December 31, 1991.

38. On December 27, 1991, Brad Kesler resigned as a Probation Officer, effective December 31, 1991, under protest.

39. On August 8th, 1992, Brad Kesler wrote a letter to many people making various allegations against Tom McQueary and specifically accused Judge McClain of forcing Brad Kesler's resignation as a Probation Officer and that the other Judges merely acquiesced.

40. While previously running for Sheriff, Brad Kesler accused former Vigo Circuit Judge Brown of being a thief and an arsonist. This resulted from the destruction of Brad Kesler's campaign material.

41. Brad Kesler has stated that he would "get even" with Judge McClain.

42. Tom McQueary admitted a criminal charge of Official Misconduct and was sentenced to fifteen (15) days in jail and placed on probation in May of 1993, as a result of his requiring sexual contact from females assigned to the Community Corrections Program. He was also sued in Federal Court along with the Vigo County Commissioners and the Community Corrections Advisory Board by six females for activities while he was Director of the Community Corrections Office. This case was settled out of Court.

43. Tom McQueary had known Jeff Reeder prior to working at Community Corrections and prior to meeting Laura Hauser. Both Tom and Jeff had worked at a grocery store. Their relationship ended after acrimonious allegations were made by both parties.

44. Laura Hauser found Tom McQueary to be "not normal", a joker and stupid.

45. Tom McQueary learned of Laura Hauser's relationship with Jeff Reeder after the two of them started to work at Community Corrections.

46. After Tom McQueary learned that Judge McClain was required to submit a blood test to determine the DNA content of the condom, he called Judge McClain and revealed that he had drafted the two letters in issue and had a friend, now deceased, contact a girl to write the letters. Tom admitted that he placed the used condom in the letter to Laura Hauser.

47. Tom McQueary admitted he obtained a used condom from the bathroom wastebasket in his home.

48. Although Judge McClain was aware that Laura Hauser moved from Terre Haute to Vincennes to her parents' house, that she had quit a job, that she received a VCR for Christmas, that she had green eyes, that she lived in an apartment, that she had a brother named Jeff, that her younger sister was pregnant, that she worked at Ambrosini's, and that she worked at the courthouse, Thomas McQueary could have known the same things.

## B. FINDING ON MATTERS OF CREDIBILITY BY THE MASTERS

1. Brad Kesler has a reputation for vindictiveness and retaliation. At least two witnesses in this matter were apprehensive of what actions Brad Kesler might take due to their testimony.

2. Brad Kesler has a reputation for fabrication, exaggeration and untruthfulness.

3. Brad Kesler's demeanor while testifying before the Special Masters was not convincing as to the truthfulness thereof.

4. The Special Masters find that Brad Kesler is not a credible witness.

5. Laura Hauser initially did not know who sent the letter; later, after confronting Jeff, who denied all allegations contained in the letters, and after talking to Brad, Laura suspected that Judge McClain had some involvement in the letter writing. Still later, in conversation with Lori Manley and Lisa McKeand, (as late as the fall of 1994 and the winter of 1994-95) Laura denied that Judge McClain was responsible for the letters.

6. In a Federal Court Deposition in March of 1993, Laura also denied that Judge McClain had any involvement in the letters.

7. Laura Hauser's demeanor while testifying before the Special Masters was inconsistent.

8. Judge McClain has a reputation in the community for truthfulness and honesty.

9. Judge McClain has never used language contained in the letters in questions in front of his staff and has a "Victorian Sense of Honor" towards women.

## C. CONCLUSIONS BY THE MASTERS

1. The Commission has failed to prove by clear and convincing evidence that Judge McClain wrote or caused to be written the letters received by Laura Hauser and/or James Hauser or that he made or caused to be made telephone calls to James Hauser and/or Laura Hauser.

2. The Commission has failed to prove by clear and convincing evidence that Judge McClain referred to Laura Hauser as his "private stock"; that he asked Brad Kesler to arrange a date with Laura Hauser; that he asked Brad Kesler to

"break up" the "relationship between Laura Hauser and Jeff Reeder"; and that he asked Brad Kesler to "plant drugs or stolen property" in Jeff Reeder's vehicle.

3. The Commission has failed to prove by clear and convincing evidence that the hiring of Laura Hauser as Community Correction Secretary and the giving of gifts to Laura Hauser violated Canons 1 and 2 of the Indiana Judicial Code of Ethics.

4. The Commission has failed to prove by clear and convincing evidence that Judge McClain violated Cannons *[sic]* 1 and 2 of the Indiana Judicial Code of Ethics.

Dated this 6th day of November, 1995.

/s/ Charles D. O'Connor
Honorable Charles D. O'Connor
Special Master

/s/ Barbara A. Harcourt
Honorable Barbara A. Harcourt
Special Master

/s/ Thomas G. Wright
Honorable Thomas G. Wright
Special Master

IN THE

SUPREME COURT OF INDIANA

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| WILLIAM C. McCLAIN | ) | |
| | ) | No. 84S00-9311-JD-1224 |
| JUDGE OF THE VIGO | ) | |
| COUNTY COURT | ) | |

ORDER

The Indiana Judicial Qualifications Commission ("Commission"), by counsel, has filed a "Motion To Compel Blood Test" in connection with the above-captioned judicial disciplinary proceeding.

As part of the evidence discovery process, the Commission asked the respondent, the Honorable William C. McClain, to allow a blood sample to be taken for DNA testing. Judge McClain refused. A motion to compel Judge McClain to allow a blood sample to be taken was filed with the Special Masters appointed to hear this case. The Masters denied the motion. The Commission sought review of that decision by this Court. The issue has been extensively briefed by the parties.

The Court duly notes the "Findings and Recommendations of Masters on Amended Motion to Compel Blood Test." However, this matter is at the discovery stage of proceedings. The Court, having carefully reviewed the record and the submissions of the parties, finds that good cause has been shown for providing the discovery requested by the Commission. Ind. TrialRule 35(A). Accordingly, the Court directs that Judge McClain allow a blood sample to be taken for the limited purpose of DNA testing as described in the Commission's

motion. Judge McClain is directed to permit such blood sample to be taken on or before August 28, 1995. This decision of the Court is final, and no rehearing may be sought.

The Clerk is directed to send copies of this Order to all counsel of record; and to the Honorable Charles D. O'Connor, Jr., Shelby Circuit Court, 407 South Harrison Street, Room 206, Shelbyville, Indiana 46176-2170; to the Honorable Barbara Arnold Harcourt, Rush Circuit Court, Rush County Courthouse, North Main Street, Rushville, Indiana 46173; and to the Honorable Thomas G. Wright, Grant Superior Court No. 2, 101 East 4th Street, P.O. Box 1151, Marion, Indiana 46952-1151.

DONE AT INDIANAPOLIS, INDIANA this /s/ 17th day of August, 1995.

/s/ Brent E. Dickson
Acting Chief Justice

All Justices concur except Selby, J., who votes to deny the motion.

IN THE

SUPREME COURT OF INDIANA

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| WILLIAM C. McCLAIN | ) | |
| | ) | No. 84S00-9311-JD-1224 |
| JUDGE OF THE VIGO | ) | |
| COUNTY COURT | ) | |

**FINDINGS AND RECOMMENDATIONS OF MASTERS ON AMENDED MOTION TO COMPEL BLOOD TEST**

The Masters, having examined and heard argument on the Amended Motion to Compel Blood Test filed by Petitioner, the Indiana Judicial Qualifications Commission, the Response in Opposition filed by Respondent, the Honorable William C. McClain and Petitioner's Reply, now find that the Petitioner has failed to show good cause that the requested blood test is related to Respondent's mental or physical condition as such condition is related to any controversy involving the pending charges.

The Masters further find that Petitioner has failed to establish probable cause that Respondent should submit to a blood test.

The Masters therefore recommend that the Amended Motion to Compel Blood Test be denied.

Dated this 16th day of June, 1995.

/s/ Charles D. O'Connor
Hon. Charles D. O'Connor, Master

/s/ Barbara Arnold Harcourt
Hon. Barbara A. Harcourt, Master

/s/ Thomas G. Wright
Hon. Thomas G. Wright, Master

Distribution:
Meg Babcock/Charles M. Kidd
Ronald E. Elberger/Scott A. Weathers

IN THE

SUPREME COURT OF INDIANA

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| WILLIAM C. McCLAIN | ) | |
| | ) | No. 84S00-9311-JD-1224 |
| JUDGE OF THE VIGO | ) | |
| COUNTY COURT | ) | |

ORDER

On March 22, 1995, a telephone conference was conducted in this cause. Participating were Meg W. Babcock and Charles M. Kidd representing the Indiana Commission on Judicial Qualifications, Ronald E. Elberger, representing the Honorable William C. McClain, and Judge Charles D. O'Connor, Master.

As a result of the telephone conference, the following deadlines are hereby imposed:

1. The Petitioner, the Indiana Commission on Judicial Qualifications, shall file its Amended Request for Blood Test by March 23, 1995.

2. Respondent, the Honorable William C. McClain, shall file his Response thereto by May 1, 1995.

3. Petitioner shall file its Reply thereto by May 15, 1995.

4. No evidentiary hearing shall be held on the blood test issue; however, Respondent reserves the right to promptly request oral argument.

5. Respondent shall file his Reply in support of his Motion to Dismiss by March 24, 1995.

6. Respondent shall file his Motion to Strike by March 28, 1995.

7. Petitioner shall file its Response to the Motion to Strike by April 4, 1995.

8. Respondent shall file his Reply in support of the Motion to Strike by April 14, 1995.

9. The previously scheduled hearing for April 3, 1995, is vacated (no notices had been sent to counsel). No hearing shall be held on Respondent's Motions to Dismiss and to Strike.

10. Final hearing shall begin at 9:00 A.M. on September 18, 1995, in Indianapolis at a location to be determined.

11. A final pre-trial conference will be scheduled at a later date.

ORDERED this 22nd day of March, 1995.

/s/ Charles D. O'Connor
Charles D. O'Connor, Master

Distribution:

Meg W. Babcock/Charles M. Kidd
Ronald E. Elberger/Scott A. Weathers

IN THE

SUPREME COURT OF INDIANA

| | | |
|---|---|---|
| IN THE MATTER OF | ) | |
| WILLIAM C. McCLAIN | ) | |
| | ) | No. 84S00-9311-JD-1224 |
| JUDGE OF THE VIGO | ) | |
| COUNTY COURT | ) | |

ORDER

The Masters, having considered the Motion for Order to Submit to Blood Test filed by the Indiana Commission on Judicial Qualifications pursuant to Trial Rule 35 of the Indiana Rules of Procedure, find that the Commission must show "good cause" related to Respondent's mental or physical condition as such condition is related to any controversy related to the pending charges. The Masters further rule that the Commission shall have the burden of proving probable cause, absent such mental or physical condition being in controversy, or if such mental or physical condition relates to the commission of a crime.

ORDERED this 7th day of February, 1995.

/s/ Charles D. O'Connor
Charles D. O'Connor
Presiding Master

Distribution:

Meg W. Babcock/Charles M. Kidd
Ronald E. Elberger/Scott A. Weathers

Supreme Court, U.S.
FILED
NOV 7 1996
CLERK

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996

(2)

No. 96-317

In the matter of WILLIAM C. McCLAIN,
Judge of the Vigo County Court

On Petition for a Writ of Certiorari to the
Indiana Supreme Court

# BRIEF IN OPPOSITION OF THE INDIANA COMMISSION ON JUDICIAL QUALIFICATIONS

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## Questions Presented

The Indiana Supreme Court removed from office and disbarred William C. McClain, who had been a county court judge, because McClain engaged in a pattern of harassment and abuse against a court employee.

1. States have a important interest in maintaining the integrity of their judiciaries. In this case, the record supports the determination that the judge participated in a pattern of harassment of a court employee and her family, culminating in sending her a used condom containing the judge's semen. Should this Court grant certiorari from the Indiana Supreme Court's removal of the judge from office?

2. A three-judge hearing panel made a general finding that McClain had a good reputation for veracity. Reviewing the record of the disciplinary proceeding before the hearing panel, the Indiana Supreme Court found that McClain had lied in a particular instance. Does the Indiana Supreme Court's finding deny the judge due process?

3. The penalty assessed by the Indiana Supreme Court was based in part on the fact that McClain lied to the hearing panel and sought to frustrate the disciplinary process by delaying the medical test that proved that his semen was in the condom he sent to the employee he harassed. Does the Supreme Court's use of these factors in determining the appropriate penalty violate due process?

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**In the**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1996**

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No. 96-317

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In the matter of WILLIAM C. McCLAIN,
Judge of the Vigo County Court

---

*On Petition for a Writ of Certiorari to the Indiana Supreme Court*

---

# BRIEF IN OPPOSITION OF THE INDIANA COMMISSION ON JUDICIAL QUALIFICATIONS

---

## Statement of the Case

William C. McClain was removed as a state trial judge and suspended from the practice of law for harassing a court employee. McClain was charged with willful misconduct in office by engaging in a pattern of harassment and abuse against the employee, her family and boyfriend. 3a.

### *Masters' Proceeding*

Pursuant to charges filed by the Indiana Judicial Qualifications Commission, the Indiana Supreme Court

appointed three masters to hear evidence. Their findings are summarized in the following paragraphs.

McClain gave the employee, L.H., two $100 monetary gifts. 27a. He gave no similar gifts to any other employee. 6a. McClain once asked her to have dinner with him, and he told her she would fit in well with his family. *Id.* L.H. and her boyfriend observed McClain sitting in his truck outside her apartment. 27a.

Someone made efforts to break up L.H.'s relationship with her boyfriend. Someone made an anonymous call to L.H. telling her that her boyfriend didn't love her. 28a. L.H.'s father received two similar calls. *Id.* These calls contained specific details about L.H. that McClain knew, although others might have known some of the details as well. 30a.

In April 1991, L.H. received an anonymous letter that contained a used condom and made vulgar accusations against her boyfriend. *Id.* The letter suggested that L.H. leave her boyfriend.

The used condom mailed to L.H. contained McClain's semen, as shown by a DNA test ordered by the Indiana Supreme Court and confirmed by an independent test McClain obtained. *Id.* At the hearing before the masters, McClain's cousin testified that *he* had obtained the condom from a waste basket and mailed it to L.H. 30a. The masters did not decide whether the cousin's account was truthful.

After hearing evidence, the masters concluded that the Indiana Commission on Judicial Qualifications had failed to prove by clear and convincing evidence that McClain had harassed L.H. 31a. The Commission filed

objections to the masters' report, McClain replied to the objections. The Indiana Supreme Court ruled *de novo* on the objections. 4a.

*Indiana Supreme Court Proceeding*

The Indiana Supreme Court adopted all fifty-seven of the masters' findings of fact, but not their conclusions of law. The Indiana Supreme Court found clear and convincing evidence in the record that McClain participated in the harassment of L.H. and her family. 5a. It specifically found clear and convincing evidence that McClain had participated in sending the harassing phone calls and letter to L.H. 19a. The court found this conduct amounted to judicial misconduct and violated Indiana Judicial Canons 1 and 2. *Id.*

The Indiana Supreme Court found that McClain's gifts to L.H., his dinner invitation and other remarks to her went beyond the usual employer-employee relationship. 6a.

The Indiana Supreme Court further noted that McClain denied sitting in his truck outside L.H.'s apartment. 7a. McClain's denial was contradicted not only by L.H. and her boyfriend, who saw him there, but by two other Vigo County judges. The two judges testified that McClain told them he had been in the area to investigate an anonymous tip of "trouble." 7a. The Indiana Supreme Court concluded that McClain "concocted" his story about the anonymous tip to justify his presence outside L.H.'s apartment. 8a. McClain's lies to fellow judges were designed to hide his interest in L.H., the court determined. 9a.

Nor did the Indiana Supreme Court believe McClain's "incredible tale" that his cousin mailed the

condom and harassing letter to L.H. 16a. The court summarized the story as follows: "in furtherance of a plot to get even with [L.H.'s boyfriend] for some old grudges, McQueary [McClain's cousin] took a used condom out of his wastebasket which he thought to be his own but which had actually been put there by [McClain], who was using McQueary's house for sexual liaisons while McQueary was on a trip to Tulsa; McQueary then put the condom in a sandwich bag, delivered it to a now deceased friend, who then had an unnamed female write an obscene note purportedly dictated by McQueary, after which the whole disgusting package was put together and sent to McQueary's friend, [L.H.], with the dead and unknown co-conspirators thinking it was all a practical joke." 15a.

McQueary did not come forward until McClain was required to take a blood test to prove the origin of the condom, and all potential corroborating witnesses for McQueary's story are conveniently unavailable. *Id.* Also, despite his kinship and close friendship with McClain, McQueary purports to have kept completely quiet for two years about his central role in the episode that put McClain's career in jeopardy. 16a. The Indiana Supreme Court found "this eleventh hour tale of vengeance and coincidence to be unbelievable . . ." 17a.

The Indiana Supreme Court removed McClain from his judicial office and suspended his law license for a period no less than two years. 20a. The court's sanction was based in part on McClain's obstructive conduct, including the creation of a false defense to the charges against him. The court found that McClain's false defense reflected directly on McClain's integrity, "the essence of the judicial vocation." 20a.

## REASONS FOR DENYING THE WRIT

### I.

### McClain has shown no significant federal issue or conflict between courts meriting this Court's intervention in the State's judicial disciplinary process.

Nothing about this case makes it worthy of this Court's consideration. McClain has identified no conflict -- and there is none -- between the Indiana Supreme Court and any other court on any significant federal issue. *See* Sup. Ct. R. 10.1(b). Indeed, the sanction is wholly consistent with disciplinary actions taken in other jurisdictions. Nor does the decision below present a noteworthy federal question that warrants review by this Court. *See* Sup. Ct. R. 10.1(c).

In fact, federalism principles counsel against certiorari in this case because judicial discipline is an important state function with which federal courts should interfere in only the rarest of cases. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432-33 (1982). In Indiana, judicial discipline is committed solely to the Supreme Court by the State Constitution, showing its significance. Ind. Const. art. 7, § 4. This Court should permit Indiana to protect its citizens from misconduct by state court judges without interference absent a very substantial federal constitutional issue.

### II.

### The masters did not find that McClain's testimony in this case was credible, so the Indiana Supreme Court's determination that he lied presents no federal question.

Contrary to McClain's characterization, the Indiana Supreme Court did not disregard the masters' credibility

findings, so this case presents no federal issue as to that claim. Rather, the Indiana Supreme Court adopted the masters' factual findings, including their findings on credibility, and determined that the record showed clear and convincing evidence of judicial misconduct as a matter of law.

The Indiana Supreme Court merely decided that all of the facts in the record constituted clear and convincing evidence of judicial misconduct. The court did not reject the masters' credibility findings. The masters found that McClain had a good *general reputation* for truthfulness. They did not find that McClain (or McQueary) told the truth *in this case*.

As the Indiana Supreme Court wrote: "The Masters found [McClain] had a reputation in the community for truthfulness and honesty. However, this does not preclude a finding of specific instances of dishonesty in his testimony, and we find that [McClain] was untruthful concerning his conduct and relationship with [L.H.]." 9a (citation omitted). This determination is an application of Indiana law, and it raises no federal question.

Thus, even if this Court were to hold that a reviewing body could not alter the factual findings of the fact-finder who heard testimony, such a holding would not change the outcome of this case. *Cf. United States v. Raddatz*, 447 U.S. 667, 673 (1980) (under Fed. R. Civ. P. 72, district courts' review of magistrates' findings is *de novo,* but district courts need not re-hear testimony). The Indiana Supreme Court did not reject the masters' credibility finding about McClain, which was only as to his general reputation for truthfulness, so the question posed by McClain is not presented by this case.

## III.

## The Constitution does not prohibit consideration of specific circumstances in fashioning a penalty, so the Indiana Supreme Court's reliance on McClain's fabrications and delays is proper in establishing his penalty.

Nothing in the Constitution prohibited the Indiana Supreme Court from considering the specific circumstances of McClain's case, including his fabricated defense, in sanctioning him. It is well-established that a court may consider the specific circumstances of a case and an offender in determining what penalty is proper. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993); *Wasman v. United States*, 468 U.S. 559, 563 (1984).

In this case, the Indiana Supreme Court based its sanction in part on McClain's obstructive conduct, including his resistance to blood testing and his concoction of a false defense, because these matters reflected adversely on the integrity of the judiciary. The Indiana Supreme Court noted that attorneys and judges have affirmative obligations under applicable disciplinary rules to cooperate with investigations. The court properly reasoned that a judge should be held to a higher standard than an average citizen and that his attempts to obstruct the judicial disciplinary process reflected poorly on the integrity of the judiciary.

McClain had an independent duty to cooperate with the Judicial Qualification Commission's investigation. *See* Ind. R. Prof. Conduct 8.1. An attorney's failure to cooperate in the disciplinary process is a separate offense under the rules, and it may lead to additional sanctions. *Committee on Professional Ethics v. Horn*, 379 N.W.2d 6, 9 (Iowa 1985); *In re Staab*, 719 S.W.2d 780, 783-84 (Mo.

1986). Even in the criminal context, cooperation may favorably affect a sentence. *Wade v. United States*, 504 U.S. 181,185 (1992); 18 U.S.C. § 3553(e); Sentencing Guidelines §§ 3E1.1(a), 5K1.1.

The Indiana Supreme Court also based its sanction in part on McClain's lies about how the condom came to be transmitted to L.H. McClain's argument depends on his contention that he did not lie, although the Indiana Supreme Court found that he did. 15a-16a. In essence, McClain now asks this Court to re-try the factual accuracy of his defense. Petition at 13.

Providing false evidence to disciplinary authorities violates rules of professional conduct and justifies discipline. *See, e.g., In re Kaine*, 424 N.W.2d 64, 65 (Minn. 1988); *Office of Disciplinary Counsel v. Wittmaack*, 513 Pa. 609, 522 A.2d 522, 530-31 (1987); *Matter of Gantt*, 286 S.C. 550, 335 S.E.2d 241, 242 (1985); *People v. Gibbons*, 685 P.2d 168, 175 (Colo. 1984). Even in the criminal context, courts may base sanctions on the defendant's specific conduct during the proceeding. When a defendant lies at his trial, a court is justified in enhancing his sentence. *United States v. Dunnington*, 507 U.S. 87 (1993); United States Sentencing Comm'n, Sentencing Guidelines Manual § 3C1.1 (1995).

Nor did the Indiana Supreme Court penalize him for asserting his Fourth Amendment right, assuming a judge has a valid Fourth amendment claim when asked to submit to medical testing in a judicial discipline proceeding. In assessing its sanction, the Indiana Supreme Court noted McClain's "obstructive and uncooperative posture toward the Commission's investigation." 20a. These delaying tactics consisted not of McClain's assertion of his rights, but rather of McClain's on-again-off-again agreement to

take the blood test and his lengthy delay in providing the Commission with the written results of the DNA test performed by his own expert. 11a. McClain's refusal to timely provide the results of his independent DNA tests on the condom in discovery would, by itself, support the Indiana Supreme Court's finding of lack of cooperation.

In this case, the Indiana Supreme Court acted well within established national practice when it shaped McClain's sanction partly on his false story to the Commission and his attempts to obstruct the investigation by delaying his blood test and failing to provide his independent DNA test results in discovery. It did not sanction him for asserting his constitutional rights, and the Court should not grant certiorari to review a question not presented by the case. His petition for certiorari presents no issue worthy of review.

## Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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*IN THE*
*SUPREME COURT OF THE UNITED STATES*
OCTOBER TERM, 1996

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In re THE HONORABLE
WILLIAM C. McCLAIN
Judge of the Vigo County Court,

*Petitioner,*

---

On Petition for a Writ of Certiorari to the
Supreme Court of Indiana

---

# PETITIONER'S REPLY TO BRIEF IN OPPOSITION

---

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*IN THE*
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On Petition for a Writ of Certiorari to the
Supreme Court of Indiana

---

# PETITIONER'S REPLY TO BRIEF IN OPPOSITION

---

Petitioner, The Honorable William C. McClain, Judge of Vigo County Court ("Judge McClain"), has two arguments in reply to the brief in opposition filed by the Indiana Commission on Judicial Qualifications ("Commission"). First, this case presents this Court with the "serious questions" reserved in *United States v. Raddatz*, 447 U.S. 667, 681 n. 7 (1980). Those questions are of national importance and the subject of conflicting decisions regarding judicial discipline in state supreme courts across the country. Second, judicial disciplinary actions are adversarial proceedings of a quasi-criminal nature such that judges accused of misconduct cannot be punished for exercising

their Fourth Amendment right to be free from an unreasonable search or seizure, nor sanctioned for exercising their due process right to present a complete defense.

## I. THIS CASE PRESENTS "SERIOUS QUESTIONS" REGARDING DUE PROCESS FOR JUDGES ACCUSED OF MISCONDUCT THAT ARE OF NATIONAL IMPORTANCE AND SUBJECT TO CONFLICTING DECISIONS

The Commission claims the Indiana Supreme Court's decision does not "present a noteworthy federal question that warrants review by this Court." Br. in Opp., p. 5. It maintains that there is no conflict between the decision below and any other court on a significant federal issue. *Id.* The Commission argues that the first question posed in the petition is not presented by this case because the Indiana Supreme Court's specific finding that Judge McClain was untruthful in this case did not reject the special masters' general finding that he has reputation for honesty. *Id.* at 6.

### A. This Case Presents "Serious Questions" Previously Reserved By The Court

While the Commission focuses exclusively on Judge McClain's credibility, the special masters heard four days of testimony from 21 separate witnesses. At issue during the hearing was not only Judge McClain's credibility, but also the credibility of all witnesses including his chief accusers, Brad Kesler and Laura Hauser. As to the Commission's "star" witness, Brad Kesler, the special masters found that he "has a reputation for vindictiveness and retaliation" such that "[a]t least two witnesses in this matter were apprehensive of what actions Brad Kesler might take due to their testimony." Pet. App. 30a ¶ 1. They further found, "Brad Kesler has a reputation

for fabrication, exaggeration and untruthfulness," and his "demeanor while testifying before the Special Masters was not convincing." Pet. App. 30a-31a ¶¶ 2-3. Brad Kesler was "not a credible witness" to the special masters. Pet. App. 31a ¶ 4.

With regard to Laura Hauser's credibility, the special masters found she "initially did not know who sent the letter . . . and after talking to Brad, Laura suspected that Judge McClain had some involvement in the letter writing. Still later, in conversation with Lori Maley and Lisa McKeand, (as late as the fall of 1994 and the winter of 1994-95) Laura denied that Judge McClain was responsible for the letters." Pet. App. 31a ¶ 5. The special masters further found, "In a Federal Court Deposition in March of 1993, Laura also denied that Judge McClain had any involvement in the letters." Pet. App. 31a ¶ 6. They concluded their findings, "Laura Hauser's demeanor while testifying before the Special Masters was inconsistent." Pet. App. 31a ¶ 7.

Most importantly, the special masters found that the Commission had failed to prove its charges against Judge McClain by clear and convincing evidence. Pet. App. 31a-32a ¶¶ 1-4; Br. in Opp. 2. After hearing all the witnesses, after judging their demeanor and credibility, and after weighing all the evidence, the special masters rendered a decision favorable to Judge McClain. The three special masters found that Judge McClain had *not* "engaged in a pattern of harassment and abuse against a court employee" and had *not* "participated in a pattern of harassment of a court employee and her family, culminating in sending her a used condom" as asserted by the Commission in its "Questions Presented."

The Indiana Supreme Court did in fact reject the special masters' express credibility findings and recommendation in deciding to discipline Judge McClain. The Indiana Supreme Court generally construes findings liberally, consistent with the ultimate decision of the tribunal below, "It is incumbent upon this Court to liberally construe findings of fact *together*, consistent with the resulting judgment." *Buchonok v. Emerick*, 558

N.E.2d 1092, 1095 (Ind. 1990) (emphasis in original); *Evansville-Vanderburgh School v. Roberts*, 405 N.E.2d 895, 899 (Ind. 1980). If a statement in the special masters' findings is ambiguous, an appellate court "must read it to support the court's judgment." *Hacienda Mexican Restaurant of Kalamazoo Corp v. Hacienda Franchise Group*, 569 N.E.2d 661, 670 (Ind. Ct. App. 1991). Instead of construing the findings consistent with the recommendation made by the special masters, under *de novo* review the Indiana Supreme Court rejected the findings. In short, this case presents the "serious questions" reserved in *United States v. Raddatz*, 447 U.S. 667, 681 n. 7 (1980).

### B. The Question Is Important Nationally And Is The Subject Of Conflict

Contrary to the Commission's assertion, judicial disciplinary proceedings in Indiana do conflict with the procedures followed in other states. Many state supreme courts accord deference to the findings and recommendations of the bodies that receives the evidence and sees the witnesses. Several of these courts, in contrast to the Indiana Supreme Court, specificallydefer to the tribunals' assessment of witness demeanor and credibility. *Counsel on Probate Judicial Conduct re Kinsella*, 476 A.2d 1041, 1049 (Conn. 1984) ("We cannot assess the credibility of witnesses"); *Matter of Inquiry Concerning a Judge*, 462 S.E.2d 728, 731 (Ga. 1995) (the court gives "substantial consideration and due deference to the Commission's ability to evaluate the credibility of the witnesses who appear before it"); *In re Bennett*, 483 A.2d 1242, 1248-49 (Md. 1984) ("the court should give full consideration to [the report of the Commission], particularly with respect to the credibility of witnesses, where the testimony is conflicting"); *In re Baber*, 847 S.W.2d 800, 802 (Mo.1993) ("where credibility is at issue, we give substantial consideration and due deference to the commission's ability to judge the credibility of witnesses appearing before it"); *Disciplinary*

*Action Against Grenz*, 534 N.W.2d 816, 818 (N.D. 1995) ("Although our review is de novo, we accord due weight to the hearing body's findings because the hearing body had the opportunity to observe the demeanor of the witnesses"); *In re Schenck*, 870 P.2d 185, 197 (Or. 1984) ("Even on *de novo* review, determinations of credibility are given significant weight when based on the fact finder's perception of a witness's demeanor"); *In re Worthen*, No. 950536; *In re Buckley*, No. 950537, 1996 Utah Lexis 91, at *32 (Utah Oct. 22, 1996) ("Long history has taught the judiciary that the forum which hears conflicting evidence has a superior capability to resolve factual questions, particularly where witness demeanor is concerned").

Other states give consideration, deference or weight to the findings and recommendations of the tribunal that receives the evidence as to factual matters. *In re McAllister*, 646 So.2d 173, 177 (Fla. 1994); *In re Hill*, 568 A.2d 361, 365 (Vt. 1989). Several do so but paradoxically still proclaim they are applying a *de novo* standard of review. *Matter of Gumaer*, 867 P.2d 850, 851 (Ariz. 1994); *Matter of Inquiry Concerning Eads*, 362 N.W.2d 541, 550 (Iowa 1985); *Mississippi Commission on Judicial Performance v. Atkinson*, 645 So.2d 1331, 1334 (Miss. 1994); *Matter of Stoker*, 827 P.2d 986, 992 (Wash. 1992). Other state supreme courts will uphold factual findings unless they are clearly erroneous. *In re Jones*, 728 P.2d 311, 313 (Colo. 1986); *Hinton v. Judicial Retirement and Removal Commission*, 854 S.W.2d 756, 758 (Ky. 1993)

Many state supreme courts, like the Indiana Supreme Court, have *de novo* review in judicial disciplinary proceedings without any deference to the fact finder. *Inquiry Concerning a Judge*, 822 P.2d 1333, 1339 (Alaska 1991); *In re Rome*, 542 P.2d 676, 684 (Kan. 1975); *In re Decuir*, 654 So.2d 687, 692 (La. 1995); *Matter of Benoit*, 487 A.2d 1158, 1161 n.1 (Me. 1985); *In re Seitz*, 495 N.W.2d 559, 561 (Mich. 1993); *In re Kelly*, 407 N.W.2d 182, 184 (Neb. 1987); *Matter of Seaman*, 627 A.2d 106, 110 (N.J. 1993); *Matter of Mazzei*, 618 N.E.2d

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A few state supreme courts permit the introduction of additional evidence during the independent review and evaluation of the record. *Matter of Rowe*, 566 A.2d 1001, 1006 (Del.Jud. 1989); *Idaho Judicial Counsel v. Becker*, 834 P.2d 290, 295 (Idaho 1992); *In re Miera*, 426 N.W.2d 850, 855 (Minn. 1988). Rhode Island permits the introduction of additional evidence during a review of the record on the law and facts. R.I. Gen. Laws. § 8-16-6 (1985).

In light of the significant number of judicial disciplinary proceedings occurring across the United States, the constitutional problem highlighted by this case will only magnify in time. *See* 17 Judicial Conduct Reporter (Winter-Spring 1996). Statistics on judicial conduct organizations' complaint dispositions for the reporting period 1994-95, reported in the *Judicial Conduct Reporter*, show that the organizations received approximately 11,281 complaints, and the organizations dismissed approximately 10,163 complaints without formal or informal action. *Id.* Sanctions imposed during the reporting period include 133 private censures, admonitions or reprimands, 65 public censures, admonitions or reprimands, 20 suspensions, 6 fines and 10 removals from office. *Id.* This case is important nationally and the subject of conflicting approaches in the states. The first question in the certiorari petition merits this Court's review.

## II. PENALIZING A JUDGE FOR EXERCISING HIS CONSTITUTIONAL RIGHTS VIOLATES DUE PROCESS

The Commission argues that the Indiana Supreme Court did not penalize Judge McClain for asserting his Fourth Amendment right. Br. in Opp., p. 8. It claims that the state supreme court punished Judge McClain's "on-again-off-again agreement to take the blood test and his lengthy delay in providing the Commission with the written results of the DNA test performed by his own expert." *Id.* at 8-9. The Commission further argues, "Nothing in the Constitution prohibited the Indiana Supreme Court from considering . . . his fabricated defense, in sanctioninghim." *Id.* at 7. It claims that Judge McClain's "argument depends on his contention that he did not lie, although the Indiana Supreme Court found that he did." *Id.* at 8. The Commission argues, "In essence, McClain now asks this Court to re-try the factual accuracy of his defense." *Id.*

### A. The Indiana Supreme Court Punished Judge McClain For Asserting His Right To Be Free From An Unreasonable And Intrusive Blood Test

A fair reading of the Indiana Supreme Court's opinion is that Judge McClain was punished for asserting his Fourth Amendment right against unreasonable searches and seizures. Pet.App. 11a-12a, 20a. Judge McClain's failure to come to an agreement with the Commission regarding the blood test cannot be a basis for punishing him when the Commission has the procedural tools at its disposal to obtain the information. A judge accused of misconduct should not be forced to waive constitutional rights. *See In re Ruffalo*, 390 U.S. 544, 551 (1968) (attorney disciplinary actions are "adversary proceedings of a quasi-criminal nature").

Judge McClain did not delay providing the Commission with his own DNA report. The special masters heard from 21 witnesses over four days beginning on September 18, 1995 and concluding on September 21, 1995. Pet.App. 21a. At that time, Judge McClain did not have the results of his own blood test to confirm the Commission's test which had been provided approximately ten (10) days prior to the hearing. In October, 1995, Judge McClain advised the Commission that his own DNA test results were the same as those of the Commission, but that a written report could not be prepared until November. On November 6, 1995, the special masters entered their findings of fact and conclusions of law. Pet.App. 32a. On November 22, 1995, theCommission requested the production of Judge McClain's report. Judge McClain objected on December 8, 1995 noting that the hearing had been completed months before. On December 22, 1995, the Commission moved the Indiana Supreme Court to compel production of the report. Judge McClain responded on January 10, 1996, and the Commission filed a reply on January 16, 1996. On January 17, 1996, "a majority of the [Indiana Supreme] Court" entered an order compelling production by January 24, 1996. Judge McClain complied. Nothing in these proceedings provide a basis to impose additional discipline against Judge McClain.

### B. The Commission's Argument Depends Upon The Indiana Supreme Court's Finding Reversing Credibility Findings That Judge McClain Lied, Even Though The Special Masters Who Heard And Saw Him Made A Contrary Credibility Finding

Judge McClain is not requesting that this Court "re-try" the factual assertions of his defense; rather, the Indiana Supreme Court cannot "re-try" witness credibility and demeanor without seeing or hearing the witnesses in question. More particularly, the Indiana Supreme Court cannot punish Judge McClain for

presenting a defense credited by the special masters. The Commission cannot be permitted to bootstrap the state supreme court's erroneous finding in a credibility and demeanor vacuum into a basis for additional discipline.

The special masters found that Judge McClain told the truth: "Judge McClain has a reputation in the community for truthfulness and honesty" and "Judge McClain has never used language contained in the letters in questions in front of his staff and has a 'Victorian Sense of Honor' towards women." Pet. App. 31a ¶¶ 8-9. They found that Tom McQueary sent the letters and placed the used condom in the letter to Laura Hauser. Pet. App. 30a ¶ 46-47. JudgeMcClain cannot be punished consistent with due process for presenting a complete defense.

## CONCLUSION

The petition for writ of certiorari should be granted.

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